# INDEX



CITATIONS

Cases:

# In the Supreme Court of the United States

OCTOBER TERM, 1972

No.

UNITED STATES OF AMERICA, PETITIONER

*v.*

UMBERTO JOSE CHAVEZ, ET AL.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported. The opinion of the district court is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on February 28, 1973 (App. B, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether, in a case where the Attorney General personally authorized the submission of one of two wiretap applications to the district court, the procedures followed in the Department of Justice in authorizing applications for wiretap orders and identifying the officer authorizing the wiretap application were sufficient to comply with Title III of the Omnibus Crime Control and Safe Streets Act of 1968.

2. Whether, if the procedures followed were improper, suppression of the wiretap evidence is required in this case.

## STATUTES INVOLVED

18 U.S.C. 2516 provides in pertinent part:

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, * * *

* * * * *

18 U.S.C. 2518 provides in pertinent part:

(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall

state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

* * * * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

* * * * * * *

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; * * *

* * * * *

STATEMENT

1. The defendants in this case were charged with a conspiracy involving the importation of heroin into the United States in violation of 21 U.S.C. (1964 ed.) 173 and 174. Additionally, defendant Chavez was charged with using a telephone in foreign commerce to promote an unlawful narcotics business in violation of 18 U.S.C. 1952, and defendant Fernandez was charged with traveling in foreign commerce with the same purpose, also in violation of 18 U.S.C. 1952. Prior to trial, the government notified the defendants that it intended to use at trial evidence obtained from court-authorized wire interceptions and court-author-

ized pen registers conducted under court orders of February 18, 1971, and February 25, 1971.[1] The former order authorized interceptions of a telephone listed under the name of defendant Chavez and the latter order allowed interceptions of a telephone listed under the name of defendant Fernandez. The defendants filed various motions to suppress, including motions challenging the procedure under which the applications were authorized within the Department of Justice. The government opposed these motions and filed affidavits similar to those filed in *United States* v. *Giordano,* No. 72–1057, this Term, certiorari granted, March 26, 1973, and *United States* v. *Richard Michael King,* petition for a writ of certiorari being filed simultaneously with this petition, describing the procedure followed.[2]

The first interception request here, culminating in the February 18, 1971 wiretap of the Chavez telephone, was personally approved by the then Attorney General John N. Mitchell, for submission to the district court (App. A, *infra,* p. 3a). The second request—the application for the February 25, 1971 wiretap of the Fernandez telephone—was made when the Attorney General was not available and was authorized by the Executive Assistant to the Attorney Gen-

[1] A pen register is a device used in conjunction with an interception of a telephone to record the telephone numbers of the outgoing telephone calls from the intercepted telephone.

[2] Affidavits of John N. Mitchell, former Attorney General, Sol Lindenbaum, Executive Assistant to the Attorney General, Henry E. Petersen, Assistant Attorney General, Criminal Division (formerly Deputy Assistant Attorney General), and Harold Shapiro, Deputy Assistant Attorney General, Criminal Division, were filed.

eral, Sol Lindenbaum, who concluded from his knowledge of the Attorney General's actions in previous cases that the latter would approve the request. These requests had previously been reviewed by a Unit of the Organized Crime and Racketeering Section of the Criminal Division, the Deputy Chief or Chief of that Section and a Deputy Assistant Attorney General.

In both instances, after approval by the Attorney General's office, a memorandum was addressed to the Assistant Attorney General in charge of the Criminal Division, Will Wilson, informing him of the approval and designating him to authorize the trial attorney in the field to submit the application to the district court. Letters were then sent to the trial attorney over Assistant Attorney General Wilson's signature (which was affixed, pursuant to his standing directions, by a Deputy Assistant Attorney General), advising the trial attorney that he was authorized to file a wiretap application in the district court. The applications filed in court stated that the Attorney General "has specially designated in the proceeding the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, to authorize affiant [Justice Department trial attorney] to make this application for an Order authorizing the interception of wire communications. This letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A" (App. A, *infra*, p. 5a). Thereafter, the court found probable cause and issued wire interception or-

ders. These orders specified that government agents were authorized to act pursuant to the application authorized by Assistant Attorney General Wilson "who has been specially designated in this proceeding by the Attorney General * * * to exercise the powers conferred on the Attorney General by Section 2516 of Title 18 * * *" (App. A, *infra*, p. 6a).

2. After a hearing on the motions to suppress, the district court entered an order suppressing the wiretap evidence and its fruits. As to the first wiretap, it found that the application and order did not properly identify the officer authorizing the application as required by 18 U.S.C. 2518(1)(a) and (4)(d). As to the second wiretap, it found that the application was not properly authorized as required by 18 U.S.C. 2516(1).

On the government's appeal, the court of appeals affirmed. It ruled, as to the first wiretap which had been approved by the Attorney General, that while it was properly authorized under section 2516(1), it was legally defective because the application for the order and the order itself misidentified the officer who had authorized the application, in violation of section 2518 (1)(a) and (4)(d). It found that the purpose of the latter section was to fix responsibility in "only a few specifically identified and publicly responsible officials" in order to avoid an "institutional decision," and that the form of application for the orders in this case "has the defect of obscuring from public view the identity of the persons making the decision and the factors which influenced their formulation of policy" (App. A, *infra*, p. 9a). It concluded that sup-

498-647—73——2

pression was necessary to avoid countenancing "an apparently deliberate deception of the courts by the highest law officers of the land" (App. A, *infra*, p. 10a). As to the second wiretap, the court below rested its decision on *United States* v. *King*, *supra*, and held that section 2516(1) did not permit the Attorney General's Executive Assistant to authorize the application on behalf of the Attorney General, even with the latter's general approval.

### REASONS FOR GRANTING THE WRIT

1. The court below in its ruling on the first wiretap order goes beyond the Fourth Circuit's decision in the *Giordano* case, No. 72–1057, which the Court on March 26, 1973, agreed to review. It is the first appellate court decision that a wiretap order based on probable cause is illegal and its fruits subject to suppression because the application for the order identified the Assistant Attorney General in charge of the Criminal Division as the person within the Department of Justice who authorized its filing when in fact the Attorney General personally did so. In so holding, the court below has construed Title III of the Omnibus Crime Control and Safe Streets Act of 1968 in conflict with decisions by the Courts of Appeals for the Second, Third and Eighth Circuits. *United States* v. *Cox*, 462 F.2d 1293 (C.A. 8), petition for a writ of certiorari pending, No. 72–5278; *United States* v. *Ceraso*, 467 F. 2d 647 (C.A. 3); *United States* v. *Cafero*, Nos. 72–1577 and 72–1578 (C.A. 3), decided January 30, 1973; *United States* v. *Fiorella*, 468 F. 2d 688 (C.A. 2), petition for a writ of certiorari pending, No. 72–863;

*United States* v. *Pisacano*, 459 F. 2d 259 (C.A. 2), petition for a writ of certiorari pending, No. 71–1410; *United States* v. *Becker*, 461 F. 2d 230 (C.A. 2), petition for a writ of certiorari pending, No. 72–158; *United States* v. *Wright*, 466 F. 2d 1256 (C.A. 2), certiorari denied January 22, 1973, No. 72–5665.[3]

2. Our petition in *Giordano* sets forth the reasons why we believe this Court should review the validity of the procedures followed by the Department of Justice in applying for wiretap orders and why we contend that there is no justification for suppressing the fruits of otherwise valid wiretaps even if those internal executive procedures were not in literal compliance with the wiretap statute. Those reasons, while particularly directed in *Giordano* to an application for a wiretap order in which the Executive Assistant to the Attorney General approved the submission of the application to the district court (the second wiretap application here), likewise tend to sustain an application where the Attorney General himself has approved its submission to the district court (the first wiretap application here). As we there point out, the purpose of both the authorizing section, 18 U.S.C. 2516(1), and

[3] In view of this newly developed conflict and our filing of the present petition, we are filing supplemental memoranda in *Cox* and *Fiorella*, withdrawing our opposition to certiorari in those cases. Since *Becker* and *Pisacano* involve authorizations by the Executive Assistant to the Attorney General, Mr. Lindenbaum, as well as by the Attorney General, we have already filed memoranda, in conjunction with our petition in *Giordano*, withdrawing our opposition to certiorari in those cases. We are also filing a petition for a writ of certiorari to review the decision by the court below in *United States* v. *King*, which follows *Giordano*.

the provisions which require the authorizing officers to be identified in the application and order, 18 U.S.C. 2518(1)(a) and (4)(d), was to fix responsibility for the policy decision to apply for the wiretap. We submit that the Justice Department's former procedures sufficiently complied with this congressional purpose. Our argument in support of this assertion is summarized in our *Giordano* petition, a copy of which we are serving on respondents.

3. The suppression of the first wiretap order in the present case illustrates the harshness of the application of the exclusionary rule. The first wiretap order was based on a finding of probable cause by a district court on an application which had been personally authorized within the Department of Justice by the Attorney General himself. The courts below have ordered the fruits of this wiretap suppressed because the letter sent to the field attorney notifying him that he was authorized to apply for court approval of a wiretap inaccurately indicated that the authorization represented the decision of an Assistant Attorney General when it actually was the decision of the Attorney General personally. To say, as did the court below, that this was "deliberate deception of the courts by the highest law officers in the land" ignores the crucial fact that this impression was immaterial to the determination of probable cause and necessity required of the district court, and to the right of the persons subject to the wiretap that there be no unwarranted invasion of their privacy.

Finally, if the ruling of the Ninth Circuit is allowed to stand by this Court, it will result in suppression of

wiretap evidence in all cases in that circuit where the application was submitted prior to early 1972 when the Department of Justice changed its procedures in response to the objections raised to the former procedures by the Fifth Circuit in *United States* v. *Robinson*, 468 F. 2d 189 (1972), panel decision vacated and case remanded for evidentiary hearing following rehearing *en banc*, January 16, 1973.[4] Unless reversed, the decision below will abort a substantial number of major prosecutions in the organized crime and narcotics areas based on evidence secured with full respect for the Fourth Amendment interests of the defendants. Hypertechnical construction of the wiretap statute should not be allowed to bar these prosecutions.

## CONCLUSION

Because of the explicit conflict among the circuits and the substantial practical importance of the issues, this petition for a writ of certiorari should be granted. The ruling here in suppressing the applica-

[4]As we have noted in earlier memoranda and certiorari petitions dealing with authorizations by the Attorney General's Executive Assistant, such authorizations on behalf of the Attorney General have not been permitted since November 20, 1971. In early 1972, the procedures were further revised. Under the procedures followed since that time, after the Attorney Generally personally authorizes the filing of the application, he then personally signs a memorandum to the Assistant Attorney General in charge of the Criminal Division, directing him to notify the trial attorney of the authorization. The Assistant Attorney General thereupon personally signs a letter to the trial attorney, notifying him that the Attorney General has authorized the application. Both the letter from the Assistant Attorney General and the memorandum from the Attorney General are attached to the application submitted to the district court.

tion authorized by the Attorney General himself involves a different facet of the problem presented in *Giordano*—here the issue is the consequence of inaccurate statements regarding the identity of the authorizing officer, whereas in *Giordano* the issue is the effect of action taken by the Attorney General's Executive Assistant. We therefore suggest that certiorari should be granted in this case and that the case should be heard along with *Giordano*.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*
HENRY E. PETERSEN,
*Assistant Attorney General.*
HARRIET S. SHAPIRO,
*Assistant to the Solicitor General.*
SIDNEY M. GLAZER,
JOHN J. ROBINSON,
*Attorneys.*

MARCH 1973.

# APPENDIX A

United States Court of Appeals
For The Ninth Circuit
No. 72-2240

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

*v.*

UMBERTO JOSE CHAVEZ, ET AL.,
DEFENDANTS-APPELLEES

*Appeal from the United States District Court for the Northern District of California*

Decided February 28, 1973

Before BARNES, BROWNING AND DUNIWAY, Circuit Judges

DUNIWAY, *Circuit Judge*: This case is in most respects similar to *United States v. King*, 9 Cir., 1973, —— F.2d ——, decided today. However, it differs in one important respect.

Umberto Chavez, James Fernandez, and ten others were indicted for conspiring to import and distribute heroin in the United States, a violation of 21 U.S.C. §§ 173, 174. Chavez and Fernandez were also charged with various activities prohibited by 18 U.S.C. § 1952. The government's case was largely derived from two wiretaps, one of Fernandez' telephone in Union City, California, and one of Chavez' telephone in Fremont, California. The district court held that these wiretaps had been conducted in violation of Title III of the Omnibus Crime Control and Safe Streets Act of 1968,

18 U.S.C. §§ 2510–2520, and ordered their fruits suppressed. The government appeals under 28 U.S.C. § 3731; we affirm.

The procedures by which the Fernandez tap was authorized are identical to those described in *United States* v. *King, supra.* As in *King,* the application to the district judge identified Assistant Attorney General Will Wilson as designated by the Attorney General under 18 U.S.C. § 2516 to authorize the application. It was accompanied by a Will Wilson letter substantially the same as that in *King.* As in *King,* the District Judge's order identified Wilson as the person authorizing the application. As in *King,* practically everything stated in the Wilson letter is false. As in *King* there are affidavits by Harold Shapiro, Sol Lindenbaum and Will Wilson. There is no affidavit by former Attorney General Mitchell, but this is immaterial because the Lindenbaum affidavit fully discloses that the Attorney General had chosen not to designate an Assistant Attorney General to authorize applications for interceptions, but had required that all such applications be referred to him for consideration. It also discloses that it was Lindenbaum, not Mitchell, who approved the application. As in *King,* there is a Memorandum, purportedly from Mitchell but actually from Lindenbaum, to Wilson. The relevant content of all of these papers is practically identical to the content of those in *King.* This is the proverbial "spotted cow" case. As to the Fernandez tap, the order must be affirmed for the reasons stated in *King.*

However, the Chavez tap presents the issue that we expressly reserved in *King,* namely, whether misidentification of the person who authorized the applica-

tion for a wiretap requires suppression of its fruits. —— F.2d at —— p. 4. In the application by the Justice Department attorney Merten to the District Judge there is the same recital about Wilson as in *King* and there is the same Wilson letter. There is the same identification of Wilson in the Judge's order. The Wilson letter is just as false as that in *King*. As in *King*, there are affidavits. One is by Henry E. Petersen, who was at the time a Deputy Attorney General in charge of the Criminal Division of the Department of Justice. It is substantially the same as the Shapiro affidavit in *King*. The Lindenbaum affidavit is like that in *King*, but, as to the Chavez tap, it says:

> On February 16, 1971, and February 25, 1971, the Criminal Division of the Department of Justice addressed to the Attorney General requests for approval of authorization to apply for interception orders with respect to certain telephones in California. The first request related to a telephone in Fremont, California, allegedly used by Umberto Jose Chavez and others. The second related to a telephone in Union City, California, allegedly used by a person identified only as "Pelone" and others. In each instance, the request was accompanied by copies of the proposed affidavit, application, and order, as well as a recommendation for approval from the Criminal Division.
>
> With respect to the first, the Attorney General on February 18, 1971, approved the request that the authorization be given to Maurice Merten to make application for an interception order with respect to the mentioned telephone in Fremont, California. Attached is a copy of the Attorney General's personally initialed memorandum of that date to Will Wilson reflecting his favorable action on the request.

The Wilson affidavit is like that in *King*. There is an affidavit by former Attorney General Mitchell, which we quote in full:

> John N. Mitchell, being duly sworn, deposes and says:
>
> I held the office of Attorney General of the United States from January 21, 1969, through March 1, 1972.
>
> On February 18, 1971, I approved a request for authority to apply for an interception order in this case and personally initialed a memorandum of that date reflecting my favorable action on the request. I have examined the original of this memorandum and certify that it bears my initials which were personally affixed by me on February 18, 1971. Attached is a copy of my personally initialed memorandum of that date reflecting my favorable action on the request.
>
> My memorandum of approval in this case constituted a notification to the Assistant Attorney General of the Criminal Division that the discretionary action of approving the request to make application to the court for an interception order was taken by me.

The attached Memorandum is as follows:

> Date: Feb. 18, 1971.
>
> To: WILL WILSON.
> *Assistant Attorney General,*
> *Criminal Division.*
> From: JOHN N. MITCHELL,
> *Attorney General.*
> Subject: *Interception Order Authorization*
>
> This is with regard to your recommendation that authorization be given to Maurice K. Merten of the Criminal Division to make application for an Order of the Court under Title 18, United States Code, Section 2516, permitting the interception of wire communications for a twenty (20) day period to and from telephone

number 415—656–7173, located at 220 Carmelita Place, Fremont, California, in connection with the investigation into possible violations of Title 21, United States Code, Section 174, and Title 26, United States Code, Sections 4704 and 7237, by Umberto Jose Chavez, Lionel Medina Costilla, Jose Ybarra-Rivera, and others as yet unknown.

Pursuant to the power conferred on me by Section 2516 of Title 18, United States Code, you are hereby specially designated to exercise that power for the purpose of authorizing Maurice K. Merten to make the above-described application.

It is apparent that the only difference between the authorization of the Chavez tap and the authorization of the *King* taps are these. First, the Attorney General did see the request for an authorization and did approve the request. Second, he personally initialled the memorandum to Wilson.

Nevertheless, we are as much struck by the contrast between the contents of the affidavits and the recitals in the Mitchell memorandum, the Wilson letter, and the Merten application as we were in *King*.

The Merten application to the District Judge recited:

> 3. Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable John N. Mitchell, has specially designated in the proceeding the Assistant Attorney General for the Criminal Division of the United States Department of Justice, The Honorable Will Wilson, to authorize affiant to make this application for an Order authorizing the interception of wire communications. This letter of authorization signed by the Assistant Attorney General is attached to this application as Exhibit A.

This recital is entirely consistent with the Attorney General's memorandum of February 18, 1971, quoted above, but is hardly consistent with what the former Attorney General now says in his affidavit, or with the Lindenbaum affidavit. The Wilson letter attached to the application, recites:

> Accordingly, you are hereby authorized under the power specially delegated to me in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, to make application to a judge of competent jurisdiction for an Order of the Court pursuant to section 2516 of Title 18, United States Code, authorizing the Federal Bureau of Narcotics and Dangerous Drugs and the Bureau of Customs, United States Department of the Treasury, to intercept wire communications from the facility described above, for a period of twenty (20) days.

It also recites review of the request for authorization by Wilson, not Mitchell, and determinations made by Wilson, not Mitchell.

Undoubtedly these representations caused the judge to state in his order:

> Special Agents of the Bureau of Narcotics and Dangerous Drugs, United States Department of Justice and Special Agents of the United States Customs Agency Service, Bureau of Customs, Department of Treasury, are authorized, pursuant to the application authorized by the Assistant Attorney General for the Criminal Division of the United States Department of Justice, the Honorable Will Wilson, who has been specially designated in this proceeding by the Attorney General of the United States, the Honorable John N. Mitchell, to exercise the powers conferred on the Attorney General by Section 2516 of Title 18, United States Code, * * *

As we said in *King, supra,* we can see no rational explanation for the elaborate paper charade of the Mitchell memorandum, the Wilson letter, and the Merten application, unless it be to deceive the Congress and the court. That it did deceive the Judge, we have no doubt.

The rather extraordinary discrepancies between the application, the Wilson letter and the Mitchell memorandum, on the one hand, and the affidavits, on the other, led counsel to argue to the District Judge that he should find, contrary to Mitchell's *ex post facto* affidavit, that Mitchell had not personally approved the request. This, however, the Judge refused to do. He assumed that Mitchell had approved it, and so do we. Thus there was substantial compliance with Section 2516(1).

However, there certainly was not compliance with Section 2518(1)(a) which requires that "Each application for an order * * * shall * * * include * * * the identity of * * * the officer authorizing the application," or with Section 2518(4)(d) which requires that the order do likewise. There was not merely an omission of the required information; there was a misrepresentation, in circumstantial and carefully phrased detail, all pointing to Wilson as the officer authorizing the application, when in fact he did no such thing.

The government argues that there has been "substantial compliance" with Section 2518. Pointing to the legislative history of the Act, which states that Section 2518(1)(a) and (4)(d) were designed to "fix responsibility" for the authorization of wiretaps, it argues that the responsible official is "reasonably identifiable" since the "lines of responsibility lead to" Attorney General Mitchell. It relies heavily upon the fact that most courts which have faced the precise

question involved here have refused to order suppression.[1]

We are not persuaded, either by the argument or the cases. Although we agree that the purpose of Section 2518(1)(a) and (4)(d) was to fix responsibility, *see* S. Rep. No. 1097, *quoted in* 1968 U.S. Code Cong. & Admin. News 2112, 2189, 2192, we do not believe that this means the general responsibility of an agency head for the actions of his subordinates. The phenomenon of the "institutional decision is familiar to anyone who has had dealings with a bureaucracy. Basically, it is a decision which, although signed by a publicly responsible official, is made by the organization rather than by the official. *See generally* B. Schwartz, in Introduction to American Administrative Law 144-48 (1962), 2 K. Davis, Administrative Law Treatise § 11 at 36–38 (1958). Such a decision may be justified by the press of agency business or the expertise of the

---

[1] The vast majority of courts have either accepted the government's argument that Section 2518 has been substantially complied with, or have held that any violation was harmless. *United States v. Ceraco*, 3 Cir., 1972, 467 F. 2d 647; *United States v. Cox*, 8 Cir., 1972, 462 F. 2d 1293, 1297–1300; *United States v. Becker*, 2 Cir., 1972, 461 F. 2d 230, 235; *United States v. Pisacano*, 2 Cir., 1972, 459 F. 2d 259, 263; *United States v. Whitaker*, E. D. Pa., 1972, 343 F. Supp. 358; *United States v. Consiglio*, D. Conn., 1972, 342 F. Supp. 556; *United States v. Doolittle*, M.D. Ga., 1972, 341 F. Supp. 163; *United States v. D'Amato*, E.D. Pa., 1972, 340 F. Supp. 1020, 1021; *United States v. Iannelli*, W. D. Pa., 1972, 339 F. Supp. 171, 174; *United States v. Aquino*, 1972, E. D. Mich, 338 F. Supp. 1080, 1081; *United States v. LaGorga*, W. D. Pa., 1971, 336 F. Supp. 190, 195; *United States v. Cantor*, E. D. Pa., 1971, 328 F. Supp. 561. *Contra*, *United States v. Focarile*, D. Md., 1972, 340 F. Supp. 1033, 1051–60, *aff'd. sub. nom. United States v. Giordano*, 4 Cir., October 31, 1972, —— F.2d ——. We find it significant that Judge Miller's opinion in *Focarile* is the only one cited above which attempts a detailed inquiry into the purpose of Section 2518 and its relationship to Section 2516(1).

agency staff. However, it has the defect of obscuring from public view the identity of the persons making the decision and the factors which influenced their formulation of policy. Because of the sensitive nature of wiretapping and the grave threat to privacy which it represents, *see United States v. King, supra,* —— F.2d at, —— we conclude that Congress intended to eliminate any possibility that the authorization of wiretap applications would be institutional decisions. It therefore provided that only a few specifically identified and publicly responsible officials could make such decisions 18 U.S.C. § 2516(1), and that their identity must be disclosed in the application and court order. 18 U.S.C. § 2518(1)(a) and (4)(d).

For us to sanction the procedure used in this case would be to defeat the Congressional scheme. As we have shown, the application, order, affidavits, and memoranda submitted to the District Court in connection with the motion to suppress are contradictory. The court would have to engage in considerable sifting and evaluating to determine which of the rather substantial cast of characters actually approved Merten's request, and even then it could not be certain. It is precisely this type of "button, button, who's got the button" guessing game that is characteristic of the institutional decision, and that Congress intended to eliminate by Section 2518(1)(a) and (4)(d).

The government's argument suffers from a second defect. Although former Attorney General Mitchell assumed responsibility after the fact in this case, were we to approve this procedure there would be nothing to prevent future Attorneys General from remaining silent if a particular wiretap proved embarrassing. *Cf. United States v. Giordano, supra* note 1, —— F.2d at ——. The Wilson letter and the Mitchell memorandum were carefully drawn to create the illusion of

compliance with the Act. Without Mitchell's affidavit, the lines of responsibility lead to Wilson, not to Mitchell. The quality of administrative action increases when officials know that their decisions cannot escape direct scrutiny by the courts, Congress, and the public. *See* K. Davis, Discretionary Justice 111–16 (1969). We refuse to read the safeguard of openness out of the Act, contrary to Congressional intent, by emasculating Section 2518(1)(a) and (4)(d).

In sum, we hold that the identification requirements of Section 2518 (1)(a) and (4)(d) complement the authorization requirement of Section 2516(1). Without the former, the latter would be meaningless: it would be impossible to determine whether the Attorney General or one of his nine Assistant Attorneys General or someone else was actually responsible for the decision to authorize application for a wiretap. Despite the authority to the contrary, we refuse to interpret the authorization requirement strictly, *see United States v. King, supra,* and to wave away the identification provisions as mere technicalities. To do so in this case would be to countenance an apparently deliberate deception of the courts by the highest law officers in the land. The Supreme Court, the Courts of Appeals and the District Courts have traditionally relied upon the integrity of representations made to them by such officers. If we were to uphold what they did here, the door would be open to similar behavior in other cases, and the trust of the courts in the Attorney General and his Assistant Attorneys General, so vital to the efficient and effective conduct of judicial business, would soon be destroyed.[2]

---

[2] The one commendable thing that we find in this case is the apparent candor of the former Attorney General and his subordinates, once the problem was brought to light. We rely on their affidavits, as did the District Judge.

In his Memorandum and Order granting the motions to suppress in this case Judge Weigel said:

> *By plaintiff's own admission, it is clear that in the case of both wiretaps*: (1) Chief Judge Carter was misinformed by plaintiff as to the name of the individual who had authorized application; and (2) the only individual named in the application had never examined it, much less exercised discretion to authorize it. No clearer evidence could be adduced to show complete frustration of the opportunity for Congressional and public scrutiny required by the statute as a means to protect Fourth Amendment rights. The applications for these wiretaps (as well as the orders relying on them) erroneously show that they were authorized by the same man. In fact, neither of the individuals who authorized the applications was in any way identified to Chief Judge Carter, Congress or the public. Evidence secured through the wiretaps must therefore be suppressed for failure to follow the Congressional mandate set out in §§ 2518(1)(a) and 2518(4)(d).

We agree.

The order appealed from is affirmed.

# APPENDIX B

**United States Court of Appeals for the Ninth Circuit**

**No. 72-2240**

**UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT, *vs.* UMBERTO JOSE CHAVEZ, ET AL. DEFENDANTS-APPELLEES**

**Appeal from the United States District Court for the Northern District of California.**

**This cause came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.**

**On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.**

**Filed and entered February 28, 1973.**